

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-4067

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4067

ARTHUR LIPPER CORPORATION and
ARTHUR LIPPER, III,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Orders of the
Securities and Exchange Commission

PETITION OF THE SECURITIES AND EXCHANGE
COMMISSION, RESPONDENT, FOR REHEARING AND
SUGGESTION THAT REHEARING BE EN BANC

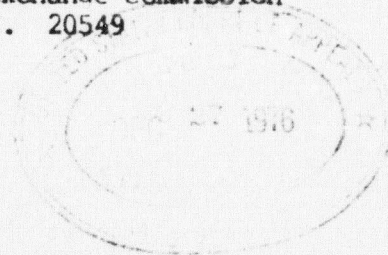
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The Securities and Exchange Commission, respondent herein, respectfully petitions for rehearing of the decision of a panel of this Court, composed of Judges Friendly, Hays, and Mulligan, insofar as that decision modifies the sanctions which the Commission imposed on Arthur Lipper Corporation ("Lipper Corp.") and its principal shareholder, Arthur Lipper III ("Lipper"), central figures in a clever fraud which the panel described as "the latest chapter in the extensive litigation resulting from the financial debacle of IOS, Ltd., S.A." (Slip Op. at 2). Because the panel's decision to modify the Commission's order expelling Lipper and Lipper Corp. from the Securities industries departs from case law well-established by both this and other circuits, and threatens to have far-reaching effects on this and other administrative agencies, the Commission suggests that rehearing be en banc.

The panel's modification of the sanctions which the Commission concluded were required in the public interest apparently resulted from misconceptions

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regarding both the range of alternatives open to the Commission, as a practical matter, in selecting administrative sanctions, and the purpose of such sanctions. Accordingly, the Commission respectfully requests

(1) that the sanctions imposed by the Commission be affirmed; or

(2) if the Court should adhere to the view that the Commission's sanctions constituted an abuse of discretion, that the case be remanded to the Commission for further consideration of the sanctions in light of such factors as the Court might wish to state.

The panel's decision, filed December 10, 1976, affirms the Commission's finding that Lipper and Lipper Corp. violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, by having aided and abetted a flagrant scheme engineered to defraud Lipper Corp.'s customers, certain off-shore mutual funds, for the benefit of Lipper and IOS, the funds' investment adviser. This scheme, described in the panel's opinion at pages 2-6, depended on Lipper's willingness to ignore entirely his fiduciary obligations and funnel payments totalling over \$1,450,000 to a subsidiary of IOS. In order to permit these kickbacks, Lipper Corp. charged the funds excessive brokerage commissions so that Lipper Corp. was able to remit 50 percent of those commissions to an affiliate of IOS.

On these facts, the Commission found that Lipper breached fundamental precepts of fiduciary duty in return for the highly profitable fund brokerage business, and said that the Lipper/IOS scheme evidenced the type of "'disregard of trust relationships by those whom the law should regard as fiduciaries' [which] was one of the evils that the Exchange Act sought to eliminate."1/

1/ A. 433, quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934).

This Court, in affirming the Commission's finding of violation, agreed that Lipper was insensitive to the fiduciary obligations owed to the fund shareholders:

"The proposition that it is a fraud on the fund for a manager simply to pocket give-ups which he has diverted to himself is almost too clear for argument. * * * It is no answer for petitioners to contend that they were in no position to police IOS' exercise of its fiduciary responsibilities; they still were under no obligation to engage in conduct aiding IOS' fraud on the funds." (Slip Op. at 10-11)

In determining the sanction which would best accord with the public interest, the Commission deemed it irrelevant that Lipper would likely no longer engage in schemes dependent on the practice of give-ups; what the Commission did find relevant was Lipper's demonstrated lack of integrity (A. 452-53). The Commission recognized that it had taken an unusually long time to render its decision, and observed that, during this period, Lipper Corp. had attempted to withdraw its broker-dealer registration, (A. 453, 454 nn. 73, 74). The Commission was, nevertheless, of the view that the public interest demanded that a sanction be imposed which would deter other broker-dealers from engaging in chicanery concocted by investment company managers at the expense of fund shareholders (A. 453). Accordingly, and believing it incompatible with the public interest for Lipper to continue in the securities business, the Commission barred Lipper from that business and revoked Lipper Corp.'s broker-dealer license, (A. 453 n. 72, A. 454).

The panel, apparently assuming that either a suspension of up to 12 months or a permanent bar and revocation were the only alternatives available to the Commission, and without remanding to the Commission for further consideration of the appropriate remedy, reduced the sanctions to a 12-month suspension of Lipper Corp.'s registration and a 12-month bar prohibiting

Lipper's association with any broker or dealer.^{2/} The panel's opinion does not, in any event, treat the public interest factors which the Commission had found controlling.

We submit that, insofar as it determined to modify the sanctions which the Commission had selected, the panel's decision was erroneous and could substantially weaken the ability of this Commission and of other agencies to utilize their statutory authority to impose administrative sanctions as a mechanism for the formulation of regulatory policy. The panel's decision appears to proceed from two basic misconceptions regarding this Commission's administrative sanctions, including the assumptions that "the choices [of sanctions are] limited to a suspension of not more than twelve months or a revocation or bar" (Slip Op. at 23) and that "persons once barred might [only] be readmitted to the securities business under proper supervision" (Slip Op. at vi, note 12). More fundamentally, the panel failed to recognize that selection of Commission administrative sanctions is a significant policy-making tool, requiring the consideration of factors not necessarily related directly to the culpability of a particular respondent, and is certainly not merely the visitation of a penalty upon those who have violated the law. ^{3/}

Conflict with Prior Decisions of the Supreme Court, this Court and other Courts

The panel's decision to order the substitution of a sanction of its

^{2/} The opinion implies that the panel, in ordering "suspension of Lipper Corp.'s registration for 12 months * * * and the barring of Lipper from association with any broker or dealer for the same period" (Slip Op. at 23), imposed the sanctions which the administrative law judge had recommended. In fact, however, Administrative Law Judge Blair would have limited Lipper Corp.'s sanction to a suspension from effecting over-the-counter transactions for one year (A. 422).

^{3/} The Commission fully agrees that this Court may review the choice of sanctions in an administrative proceeding. See Section 25(a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a)(3).

choosing for that which the Commission had selected appears to be unprecedented.^{4/} Moreover, such a revision, in the face of affirmance of the violations found by the Commission, is contrary to pronouncements of the Supreme Court, prior decisions of this Court, and holdings in the other circuits.

As the Supreme Court has emphasized, the choice of sanctions is uniquely a matter for agency determination. "[W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112 (1946). Accordingly, the reviewing court would "imping[e] on the Commission's rightful discretion were [it] to consider the various alternatives in the hope of finding one that [it] consider[s] more appropriate." Id. at 118. ^{5/}

The Supreme Court recently expressed its adherence to this philosophy in a case similar to the present one. In Butz v. Glover Livestock Commission Co.,

^{4/} Although reviewing courts have, on occasion, reversed Commission findings of violations, and, therefore, vacated the sanctions imposed, the only case cited in the panel's opinion, and the only case we have been able to locate, in which a reviewing court altered the sanction ordered by the Commission, despite affirmance of the finding of violations, is Beck v. Securities and Exchange Commission, 430 F.2d 673 (C.A. 6, 1970). That case, however, is unlike the present in that there the court did not modify but rather set aside the entire sanction -- a four-month suspension -- apparently believing that, under the circumstances, no sanction of any type was warranted. We have found no case which has followed Beck; indeed, it has only twice been cited in reported cases, both times merely in passing references. In its opinion in this case, the Commission stated, "Beck v. SEC * * * is inconsistent with these views [that a sanction may be imposed as a deterrent to others]. But we respectfully disagree with the holding of that case and decline to follow it" (A. 452 n. 69).

^{5/} See Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 229 (1946): "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served * * *. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion * * *."

411 U.S. 182 (1973), the court of appeals had held an administrative suspension of registration under the Packers and Stockyards Act "unconscionable," notwithstanding the court's agreement with the Secretary of Agriculture that the respondent had violated the Act. The Supreme Court reversed the lower court's vacation of the agency's sanction, since the "fashioning of an appropriate and reasonable remedy is for the Secretary, not the court." 411 U.S. at 188-189. The Court stated that a reviewing court's function is limited to deciding "whether * * * the Secretary made 'an allowable judgment in [his] choice of the remedy.'" Id. at 189. 6/

Past decisions of this Court have reiterated the deference due Commission determinations regarding sanctions. Indeed, this Court has repeatedly insisted that it is "not free to examine the appropriateness of action taken by the Commission [in choosing the "severe sanction" of revocation] as if it were before us in the first instance." Marketlines, Inc. v. Securities and Exchange Commission, 384 F.2d 264, 267 (C.A. 2, 1967), certiorari denied, 390 U.S. 947 (1968).7/ Moreover, this Court has rejected

6/ A panel of this Circuit has held that Butz required the affirmance of the Drug Enforcement Administration's revocation of a physician's certificate to distribute certain drugs notwithstanding the observation that "it seems to us that permanent revocation of petitioner's registration would be unduly harsh." Sokoloff v. Saxbe, 501 F.2d 571, 576 (C.A. 2, 1974). This Court suggested that the Administrator consider permitting recertification after the passage of one year. Id. at 577. The Commission likewise has established procedures for reapplication of those barred from the securities industry, and this Court has, in previous cases, upheld Commission sanctions, but suggested favorable consideration of any such application. See, e.g., Hanly v. Securities and Exchange Commission, 415 F. 2d 589, 598 (C.A. 2, 1969); Vanasco v. Securities and Exchange Commission, 395 F. 2d 349, 353 (C.A. 2, 1968).

7/ See Hanly v. Securities and Exchange Commission, supra, 415 F.2d at 598 ("imposition of sanctions necessarily must be entrusted to the expertise of a regulatory commission such as the SEC"); Tager v. Securities and Exchange Commission, 344 F.2d 5, 9 (C.A. 2, 1965) ("courts should

various of the factors on which the panel relied in upsetting the Commission's sanctions against Lipper and Lipper Corp. For example, the panel here noted a "tremendous disparity between the sanctions invoked against petitioners and that imposed on two other brokers" in other proceedings. (Slip. Op. at 22).^{8/} Yet, in Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858 (C.A. 2, 1970), this court rejected a similar argument: "[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding." The Hiller court concluded that any comparison of sanctions was foreclosed by Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (C.A. 2, 1967). See 429 F.2d at 858. Dlugash, which was neither cited nor discussed in the present opinion, was also held to preclude an inquiry into the disparity among sanctions in Vanasco v. Securities and Exchange Commission, 395 F.2d 349, 353 (C.A. 2, 1968).

Similarly, although the panel here stated that "some weight may properly be given" to the administrative law judge's views regarding the appropriate sanction, this Court has held otherwise. "[T]he fact that the Commission differs

^{7/} (footnote continued)

not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission"). See also, Sinclair v. Securities and Exchange Commission, 444 F.2d 399, 402 (C.A. 2, 1971); Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858 (C.A. 2, 1970); Fink v. Securities and Exchange Commission, 417 F.2d 1058 (C.A. 2, 1969); Gross v. Securities and Exchange Commission, 418 F.2d 103, 107 (C.A. 2, 1969); Vanasco v. Securities and Exchange Commission, *supra*, 395 F.2d at 352-353; Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (C.A. 2, 1967); Nassau Securities Service v. Securities and Exchange Commission, 348 F.2d 133, 136 (C.A. 2, 1965); Berko v. Securities and Exchange Commission, 316 F.2d 137, 141-142 (C.A. 2, 1963); Boruski v. Securities and Exchange Commission, 289 F.2d 738, 740 (C.A. 2, 1961). See generally, 2 Loss, Securities Regulation 1323-1326 (2 ed. 1961).

^{8/} It should be noted that the sanctions in the other proceeding to which the panel referred were the results of settlements and, of course, were based on different facts. See Appendix to Reply Brief of Petitioners.

with the examiner in the matter of sanctions is of no legal significance." Gross v. Securities and Exchange Commission, 418 F. 2d 103, 107 (C.A. 2, 1969).^{9/} Finally, while the panel here held that the imposition of a permanent bar was "too severe" (Slip Op. at 21), this Court has previously refused to disturb sanctions simply because it considered them "severe" or "harsh," although it has, at times, suggested that the Commission consider relief upon an application from the respondent.^{10/}

The panel's decision to substitute a new sanction for that ordered by the Commission also appears to be in conflict with decisions of the Ninth and District of Columbia Circuits, which have held that, where the facts authorize the imposition of a given sanction,

"the determination of whether it should take that action rests within the sound discretion of the agency." [quoting San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F.2d 162, 165 (C.A. 9, 1967)]
* * * "This court ordinarily should not substitute its judgment of what would be appropriate under the circumstances in place of the Commission's judgment as to measures necessary to protect the public interest." [quoting Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163 (C.A. 9, 1956)] "O'Leary v. Securities and Exchange Commission, 424 F.2d 908, 911-912 (C.A.D.C. 1970).

Similarly, the Tenth Circuit has clearly stated that the revision of Commission sanctions is not normally a judicial function. Associated Securities Corp v. Securities and Exchange Commission, 293 F.2d 738, 741 (C.A. 10, 1961); see also, Quinn and Company v. Securities and Exchange Commission, 452 F.2d 943, 947 (C.A. 10, 1971), certiorari denied, 406 U.S. 957 (1972).

^{9/} See also Hiller v. Securities and Exchange Commission, *supra*, 429 F.2d at 858; Fink v. Securities and Exchange Commission, *supra*, 417 F.2d at 1059; Hanly v. Securities and Exchange Commission, *supra*, 415 at 598-599.

^{10/} See, e.g., Sinclair v. Securities and Exchange Commission, *supra*, 444 F.2d at 402; Fink v. Securities and Exchange Commission, *supra*, 417 F.2d at 1060; Vanasco v. Securities and Exchange Commission, *supra*, 395 F.2d at 353; Marketlines, Inc. v. Securities and Exchange Commission, *supra*, 384 F.2d at 267. Accord, Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973); Sokoloff v. Saxbe, *supra*, 501 F.2d at 576-577; River Forest Pharmacy, Inc. v. Drug Enforcement Administration, 501 F.2d 1202, 1206 (C.A. 7, 1974).

Misapprehension of the function of Commission sanctions

The panel's determination to revise the Commission's sanctions apparently resulted, in part, from a misunderstanding of the role which the selection of sanctions plays in the discharge of the Commission's regulatory mandate. First, the panel characterized Commission administrative sanctions as "penalties" (Slip Op. at 1, 2, 18, 19, 20, 21; cf. note 6 at ii-iii) Yet, prior decisions of this Court have instructed that Commission sanctions "are intended to be remedial rather than penal, a result of the fact that the 'design of the statute is to protect investors' and the general public in this specialized field." Berko v. Securities and Exchange Commission, 316 F.2d 137, 141 (C.A. 2, 1963) (Marshall, J.), quoting Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 124 (1953).^{11/}

Second, the panel seems not to have fully appreciated the fact that Commission orders are policy-making tools, which respond not solely to the facts in a given case, but to the overall effect which the Commission desires to achieve in order to accomplish its regulatory responsibilities.^{12/}

^{11/} See Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163 (C.A. 9, 1956); accord, Associated Securities Corp. v. Securities and Exchange Commission, 293 F.2d 738, 741 (C.A. 10, 1961):

"The balancing of private detriment against public harm requires the fair and proper exercise by the Commission of its discretionary powers. The evaluation of facts and the exercise of judgment for the protection of investors dealing in over-the-counter securities is a function assigned by Congress to the Commission rather than the courts and the exercise by the Commission of its discretionary powers will not be upset by the courts except for cogent reasons."

^{12/} In regard to the policy-making aspects of sanctions, the Commission has stated:

"When we deal with these matters, we must weigh the effect of our action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally. If these proceedings are to be truly remedial, they must have a deterrent effect on others in the business who may otherwise be tempted to succumb to the lethal admixture of mindless enthusiasm and overweening greed that so often brings fraud and deceit in its wake. Compare Arthur Lipper Corporation, Securities Exchange Act Release No. 11773 [citation]." Matter of Richard C. Spangler, Inc., Securities Exchange Act Release No. 12104 (Feb. 12, 1976), 8 SEC Docket 1257, 1268 n. 67.

The Commission fashioned its order mindful of these responsibilities in this case. In its opinion, the Commission stated that it found itself constrained to order a sanction which would "have a deterrent effect on other broker-dealers who may be inclined to participate in the fraudulent schemes concocted by investment managers" (A. 453). The Commission also found that, since Lipper's violation was not "some isolated indiscretion," (indeed, the kickback scheme persisted well over a year) future misconduct by Lipper was significantly likely. Id. While this Court might have reached a different result had the task of weighing these factors fallen initially to it, "the determination of the sanctions necessary to protect the public rests primarily within the competence of the Commission." 13/

Further, as discussed above (p. 7), the panel, contrary to prior decisions of this Court, gave special weight to a "policy" of consistency of sanctions for generally similar misconduct charged in entirely separate administrative proceedings. The Commission, however, seems to have concluded that a policy of consistency in the same proceeding was paramount. 14/ Assuming, arguendo, that the Commission, in selecting its sanction, should have expressly addressed the consistency issue, we believe that the appropriate solution is for the Court to remand to the Commission for consideration of that factor.

13/ Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (C.A. 2, 1965). See Pierce v. Securities and Exchange Commission, supra, 239 F.2d at 163; see also Butz v. Glover Livestock Commission Co., supra, 411 U.S. at 188-189; American Power & Light Co. v. Securities and Exchange Commission, supra, 329 U.S. at 118.

14/ In the consolidated proceeding from which the orders under review arose, the Commission also permanently barred IOS, Ltd. from association with any broker or dealer. In selecting the sanctions appropriate to the Lipper respondents, the Commission noted that, in frauds of this sort, "the remitting broker [Lipper Corp.] and the institutional manager are acting in pari delicto" (A. 453). Thus, the Commission may have felt that a policy of uniform sanctions for joint violators in the same proceeding took precedence over the policy implemented by the panel, comparable sanctions for generally comparable conduct in different proceedings. Cf. Hiller v. Securities and Exchange Commission, supra, 429 F.2d at 858.

Finally, the panel stated that the "considerable uncertainty as to the regulatory climate concerning give-ups" which the Commission alluded to in its amicus brief in Tannenbaum v. Zeller, No. 75-7503 (C.A. 2, pending), militated in favor of a lesser sanction (Slip Op. at 22). This argument ignores the radical differences between give-ups on an exchange, the only type of give-up with which Tannenbaum deals, and the over-the-counter give-ups involved in this case. Again, in any event, even if the panel correctly concluded that this was a policy factor to which the Commission should have accorded greater weight, the proper disposition was a remand to the Commission, rather than an order directing the entry of a revised sanction of the panel's choosing.

Misapprehension of the available range of sanctions

The panel assumed that the choice of sanctions available to the Commission was limited to a suspension of up to 12 months or a revocation or bar; thus, in substituting 12-month suspensions for the revocation and bar ordered by the Commission, the panel apparently believed that it had simply substituted the other of only two possible remedies for that which the Commission had chosen. Of course, the panel correctly stated the language of Section 15(b)(4),(6) of the Securities Exchange Act, 15 U.S.C. 78o(b)(4), (6). The Commission has, however, in appropriate cases, imposed permanent bar orders which recite that the respondent may reapply for association with a broker-dealer after the passage of a specified interval.^{15/} This is not to say that a person would necessarily be permitted to re-enter

^{15/} The Commission's power to remove a permanent bar arises from Section 15(b)(6) which provides that the Commission may consent to the reassociation with a broker-dealer of a person subject to a bar or a

the securities business at the expiration of the period named in the Commission's order, nor is it a certainty that the Commission would ever permit re-entry. Rather, this practice reflects a view that, after passage of the specified time, the Commission would be likely to entertain favorably an application for readmission if, during the interim, the applicant does not engage in further misconduct and at the time of application is able to demonstrate that readmission to the securities industry would not be contrary to the public interest. ^{16/}

Thus, through the device of permanent bars coupled with permission to reapply after a specified period, the Commission has displayed a

^{15/} (footnote continued)

suspension order, or to such person's becoming a broker-dealer. While there is no express provision for reviving the registration of a revoked broker-dealer, such an entity can reapply for registration pursuant to the Commission's rules implementing Section 15(b)(1) of the Act. This Circuit has recognized the Commission's power to lift or modify disqualifications. Fink v. Securities and Exchange Commission, *supra*, 417 F. 2d at 1060; Hanly v. Securities and Exchange Commission, *supra*, 415 F. 2d at 598; Vanasco v. Securities and Exchange Commission, *supra*, 395 F. 2d at 353; Tager v. Securities and Exchange Commission, *supra*, 344 F. 2d at 9.

Three recent examples of the practice of providing leave to reapply after a specified period are Matter of Gotham Securities Corp., Securities Exchange Act Release No. 12956 (Nov. 5, 1976), 10 SEC Docket 895 (bar with leave to reapply in supervised capacity after 14 months), Matter of Willard G. Berge, et al., Securities Exchange Act Release No. 12846 (Sept. 30, 1976), 10 SEC Docket 601 (bars with leave to reapply after, respectively, 6 and 12 months); and Matter of Michael Dutzar, Securities Exchange Act Release No. 12641 (July 19, 1976), 10 SEC Docket 1141 (bar with leave to reapply in nonsupervisory capacity after 1 year and in any capacity after 3 years).

- ^{16/} The Commission set forth the factors which it considers in determining whether to grant a request for relief from a permanent bar order in Applications for Relief From Disqualification, Securities Exchange Act Release No. 11267 (Feb. 26, 1975), 6 SEC Docket 346, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶80,115. That release, a copy of which is attached hereto, also refers expressly to the practice of issuing orders which provide leave to reapply after a specified period.

measure of the flexibility to tailor its sanctions which the panel assumed was wholly lacking. Indeed, the panel indicated that, had the Commission ordered a 24-month suspension, the panel would not have interfered, but stated (correctly) that there was no authority to impose a suspension of that duration (Slip Op. at 23). The Commission could, however, upon remand, conclude that, for example, a bar with leave to reapply after 2 years should be ordered. This type of sanction is, in effect, the very procedure which this Court recommended to the Drug Enforcement Administration in Sokoloff v. Saxbe, 501 F. 2d 571, 576-577 (C.A. 2, 1974), where the Court characterized the permanent revocation of a registration as "unduly harsh," but nevertheless affirmed, suggesting that the agency afford "careful consideration" to any application for re-registration after the passage of one year.

Finally, the panel stated that any possibility of readmission after the imposition of a bar was entitled to little weight because such readmission would be contingent on guarantees of proper supervision, and "Lipper is hardly interested in returning to the business as a minor salesman in a large brokerage firm." (Slip Op. at vi, note 12). In fact, however, there is no requirement that those barred from the industry be readmitted under supervision, and the Commission has granted applications for unconditioned dissolution of such bars. 17/ In Applications for Relief From

17/ Cf. Matter of Michael Dutzar, Securities Exchange Act Release No. 12641, *supra*. Neither of the Commission's rules governing applications for relief from statutory disqualifications contain any requirement that such relief be conditioned on re-entry into the securities business in a supervised capacity. See Securities Exchange Act Rules 15b8-2 and 15Ab-1, 17 CFR 240.15b8-2 and 15Ab-1.

Disqualification, Securities Exchange Act Release No. 11267 (Feb. 26, 1975), 6 SEC Docket 346, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶80,115 (a copy of which is attached). The Commission recognized that those subject to permanent bars might wish to apply to re-enter as sole proprietors and that such applicants need not demonstrate that they would be subject to any supervision. Id., note 4. Accordingly, the imposition of a bar with leave to reapply after, for example, two years, would not necessarily relegate Lipper to the "minor salesman" role which the panel assumed would be required.

Conclusion

The panel's revision of the Commission's sanctions represents a significant departure from the principles which have heretofore governed review of quasi-judicial administrative action, which the Supreme Court has mandated, most recently in Butz v. Glover Livestock Commission Co., supra, and to which this Court has long adhered. If those principles are now to be discarded the consequences will likely be felt -- not only at the Commission -- but at all administrative agencies which discharge adjudatory responsibilities.

For the foregoing reasons, the Commission respectfully petitions for rehearing, and suggests that rehearing be en banc, as to that portion of the panel's decision which substitutes sanctions of the panel's choosing for those ordered by the Commission. The Commission's choice of sanctions should be affirmed. If the Court, however, adheres to the conclusion that the sanctions which the Commission directed constituted an abuse of its discretion, this case should be remanded to the Commission for

further consideration of the appropriate sanctions in light of such factors as the Court may indicate should guide the Commission's discretion. 18/

Respectfully submitted,

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18/ In determining to modify the Commission's sanction, the panel indicated that it was influenced by the "lapse of over three years from the argument to the decision of the Commission." (Slip Op. at 22) The panel may have feared additional delay were remand ordered. Whatever may have been the causes of the prior delay, we doubt that it would be repeated upon remand. In November 1975 the Commission instituted a program to expedite its adjudicatory processes. As a result, for example, during the period from May 11, 1976 through August 26, 1976, 9 arguments were heard and 9 opinions were issued in an average of 23 days; this contrasts with an average lapse of 14 months prior to the initiation of this program. See Letter, dated October 5, 1976, from Chairman Hills, to President Ford, regarding regulatory reform, p. 8.

ADDENDUM -- Applications for Relief From
Disqualification, Securities Exchange
Act Release No. 11267 (Feb. 26, 1975)

§ 80,115 Applications for Relief from Disqualification.

Securities Exchange Act Release No. 11267. Investment Company Act Release No. 8689. Investment Advisers Act Release No. 438. February 26, 1975. Release in full text.

Disqualification from Securities Business—Applications for Readmission—Circumstances for Relief from Disqualification.—The Commission may permit a disqualified individual or firm to have the disqualification lifted if, in the discretion of the Commission,

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§ 80,115

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New SEC Rulings

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Applications for Relief from Disqualification

sion, it appears that re-entry into the securities business would be consistent with the public interest. In this regard, the Commission will consider factors such as (1) the period of time elapsed since the disqualification was first entered, (2) the nature of the findings that resulted in the disqualification, (3) the applicant's attempts to undo any injury resulting from his prior misconduct, (4) compliance with the disqualification order, (5) the type and nature of the applicant's prospective duties, and (6) any other factors deemed pertinent by the Commission.

See § 25,551, "Exchange Act—Securities Associations" division, Volume 2; § 56,273, "Investment Advisers Act" division, Volume 4.

In the past the Commission has sometimes, in its discretion, granted applications for readmission to the securities business by individuals or firms it has previously barred from the securities business or some aspects thereof pursuant to statutory authority.¹ The Commission recognizes that situations may exist where, in light of changed circumstances and after the passage of a period of time, it may appear appropriate to the Commission, in its discretion, to permit a disqualified individual or firm to have the disqualification lifted if, in general, the applicant can make a showing satisfactory to the Commission that re-entry into the securities business would be consistent with the public interest.²

In exercising its discretion in this regard, the Commission will consider, among other things:

(a) The period of time which has elapsed since the disqualification was entered.

(b) The nature of the findings that resulted in the disqualification. This is necessarily given great weight in view of the Commission's duties to protect the public interest and investors. It should be pointed out that, in this connection, the Commission does not permit its findings or those of any other adjudicatory body upon which the disqualification was based

to be reargued or collaterally attacked in the application.³

(c) The applicant's attempts to undo any injury resulting from his prior misconduct. The Commission is likely to be more inclined to grant an application where restitution or other appropriate action was taken by the applicant to recompense persons who may have been injured by the applicant's conduct.

(d) The applicant's compliance with the disqualification order subsequent to its entry and the nature of the applicant's overall conduct during this period. On this regard, the application should specify the nature of the employment of the applicant during the period subsequent to his disqualification and should contain affidavits of persons who can attest to his employment and conduct.

(e) The type and nature of the applicant's prospective duties. In the case of an individual the Commission will consider the extent and adequacy of supervision should the disqualification be removed. In this regard, evidence as to the competence of the supervisory individuals and firm, as demonstrated by their prior experience and performance, may be significant. Often, the Commission will require that readmission be in a non-supervisory

¹ Section 15(b)(8) of the Securities Exchange Act of 1934, 15 U. S. C. 78o(b)(8), authorizes the Commission to prescribe "such specified and appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable" for any broker or dealer registered under Section 15 of that act who is not a member of a national securities association registered under Section 15A of the Act ("SECO broker or dealers"). The following provisions, additionally, authorize the Commission, after appropriate notice and opportunity for hearing, to censure, bar, or suspend an individual or firm from participating in the securities business or some aspect thereof: Sections 15(b)(5), 15(b)(7), 15A(d)(2), and 15(a)(3) of the Securities Exchange Act of 1934, 15 U. S. C. 78o(b)(5), 78o(b)(7), 78o-3 (d)(2), and 78a(a)(3); Section 9(b) of the Investment Company Act of 1940, 15 U. S. C. 80a-9(b); and Section 203(e) and 203(f) of the Investment Advisers Act of 1940, 15 U. S. C. 80b-3(e) and 80b-3(f).

² It should be noted that, in the case of a disqualified individual seeking to become employed by a broker or dealer, once such relief from disqualification has been granted by the Commission the bar is removed only so long as the individual applicant remains in the employ of the firm in the capacity and under the supervision specified in the application. In the event the firm thereafter seeks to change either the nature of such employment or the degree of supervision the firm must obtain further Commission approval. Moreover, if the individual seeks employment with another broker or dealer, both the individual and the new firm employer must submit a new application and again obtain Commission approval of such new employment prior to the individual assuming any responsibilities.

³ This is also true in the case of an applicant who has previously consented to the entry of a permanent injunction without admitting or denying the facts set forth in the complaint.

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capacity only and may impose other appropriate conditions or limitations.*

(f) Any other factors which the Commission in its discretion may deem pertinent.

The Commission may also, in its discretion, seek additional information concerning the applicant by conducting an investigation or by obtaining the views of interested third parties, including those affected by the applicant's prior misconduct.

Generally, any disqualified individual or firm desiring to apply for re-entry into the securities business either with or as a member of a registered national securities association should comply with the procedures prescribed in Securities Exchange Act Rule 15Ab-1, 17 CFR 240.15Ab-1. Any disqualified individual or firm seeking to become registered as or associated with a SECO broker or dealer, generally should comply with the procedures set forth in the Securities Exchange Act Rule 15b8-2, 17 CFR 240.15b8-2.

However, when the Commission issues an order pursuant to an administrative pro-

ceeding which specifically provides that an application for re-entry may be made after a certain time, the applicant may apply directly to the Commission. When hereafter the Commission specifies a date after which such application may be made, the Commission upon a proper showing will generally act favorably upon the application (unless the party has been otherwise advised).

An application for registration by an investment adviser previously disqualified under Section 203(e) of the Investment Advisers Act of 1940, 15 U. S. C. 80b-3(e), or by an investment adviser who seeks to employ an individual disqualified under Section 203(f) of the Act, 15 U. S. C. 80b-3(f), should be filed pursuant to Rule 203-1 thereunder, 17 CFR 275.203-1. The Commission would normally deem adequate an application which substantially complies with the procedures set forth in Securities Exchange Act Rule 15Ab-1 for removal of a disqualification imposed pursuant to Section 9(b) of the Investment Company Act of 1940, 15 U. S. C. 80a-9(b).

By the Commission.

*In the case of an individual seeking to re-enter the securities business as a sole proprietor, evidence demonstrating the extent and adequacy of a prospective employer's supervision would be non-existent. In this connection, however, it should be noted that the applicant

bears the burden of demonstrating to the Commission's satisfaction that removal of the disqualification in order to permit re-entry into the securities business as a sole proprietor would be consistent with the public interest.



OFFICE OF THE
GENERAL COUNSEL

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

December 23, 1976

A. Daniel Fusaro, Esquire
Clerk, United States Court of
Appeals for the Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: Arthur Lipper Corporation v. Securities and Exchange Commission,
No. 76-4067

Dear Mr. Fusaro:

Enclosed for filing are 25 copies of the Petition of the Securities and Exchange Commission, Respondent, for Rehearing and Suggestion That Rehearing Be En Banc in the captioned appeal. The decision from which rehearing is sought was filed on December 10, 1976, by a panel consisting of Judges Friendly, Hays and Mulligan.

I hereby certify that I have deposited copies of the Commission's Petition in the United States mail, postage prepaid, addressed to opposing counsel at the addresses indicated below.

Sincerely,

Daniel L. Goelzer

Daniel L. Goelzer
Special Counsel

Enclosures

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